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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

EDWARD P. HAMILL,

Petitioner,

vs.

DEPARTMENT OF JUSTICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

Whether the policy of the Merit System Protection Board to give preclusive effect to the guilty pleas from prior criminal adjudications violates the legislative intent and statutory mandate of the Merit System Protection Board and further violates Petitioner's right to due process of law.

STATUTES INVOLVED

This case involves: (1) the first section of the Fourteenth Amendment

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No.

EDWARD P. HAMILL,

Petitioner,

- against -

DEPARTMENT OF JUSTICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

To: The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States

Edward P. Hamill, the Petitioner herein, prays that a writ of certiorari issue to review the judgment

of the United States Court of Appeals for the Federal Circuit entered in the above-entitled case on June 11, 1986.

OPINIONS BELOW

The opinion of the United States Court of Appeals for Federal Circuit is unreported and is printed in Appendix "A" hereto, infra, page A-1. The Judgment of the United States Court of Appeals for the Federal Circuit is printed in Appendix "A" hereto, infra, page A-3.

The order of the United States of America Merit Systems Protection Board denying Petitioner's Petition for review is unreported and is printed in Appendix "B" hereto, infra, page B-1. The decision of the United States of America Merit Systems Protection Board New York Regional Office is unreported and is

printed in Appendix "B" hereto, infra, page B-4.

JURISDICTION

The judgement of the United States Court of Appeals for the Federal Circuit (Appendix "A", infra, page A-3) was entered on June 11, 1986. The jurisdiction of the Supreme Court is invoked under 28 U S C §1254(1).

QUESTION PRESENTED

Whether the policy of the Merit System Protection Board to give preclusive effect to the guilty pleas from prior criminal adjudications violates the legislative intent and statutory mandate of the Merit System Protection Board and further violates Petitioner's right to due process of law.

STATUTES INVOLVED

This case involves: (1) the first section of the Fourteenth Amendment

to the Constitution of the United States, which provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(2) the Sixth Amendment to the Constitution of the United States which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses

> against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

(3) 5 USC §§ 1101 et seq. P.L. 95-454, Title IX §903, 92 Stat. 1227 (1978).

STATEMENT OF THE CASE

Edward Hamill, the Petitioner, was removed from service as a Special Agent with the Drug Enforcement Agency (hereinafter "DEA") after five (5) years with the agency. Before his service with the DEA, the Petitioner served as an agent with the Internal Revenue Service for six-and-a-half (6-1/2) years. During his tenure in government service, the Petitioner was highly commended and never disciplined. See Hrg. Tr. at pp 160-64. On August 6, 1984, Petitioner was involved in an incident involving his car and a pedestrian.

At the time of the incident at issue, the Petitioner was working undercover in a five-month-long investigation of the notorious Hells Angels motorcycle gang in Massachusetts and Connecticut. The Petitioner was investigating the Hells Angels' involvement with the distribution of multi-quantities of meth-amphetamine. Hrg. Tr. at p. 163. This investigation led to the arrests and convictions of six defendants including one Albert Lindsey -- a gang member, on charges of double homicide. Hrg. Tr. at p. 165.

On the morning of August 6, 1984, the petitioner suffered a severe headache. He unknowingly received from his wife Tylenol No. 3 with codeine which he administered as "regular" Tylenol, a simple analgesic. The Petitioner took two (2) of these pills between 7:00 -

7:30 A.M. Hrg. Tr. at pp 169-70. Then again between approximately 4:00 P.M. or 4:30 P.M. to 7:00 P.M., the Petitioner took five (5) more of these pills. Hrg. Tr. at p. 186.

Between 4:00 P.M. and 7:00 P.M., the Petitioner had four (4) drinks at the Quadrangle Lounge. The Petitioner then blacked out and only remembers waking up at home at approximately 10:00 P.M., when his wife advised him that the windshield on his car was cracked. Hrg. Tr. at p. 173. The Petitioner did not have any recollection of the evening's events.

The next day, the Petitioner took the car to be repaired to the government auto repair shop -- ADZ Auto in Bayshore and paid for the repairs himself. There had been notification that no more repairs could be paid for

that quarter. Hrg. Tr. at p. 173. It was necessary to fix the car immediately since the Petitioner had an undercover meeting that evening. Hrg. Tr. at pp. 174-75.

On August 9, 1984, Leonard Williams of the DEA notified the Petitioner that an investigation was being conducted relative to the possibility that the Petitioner had struck a bicyclist with his car on the evening of August 6th. Hrg. Tr. at p. 175.

The Petitioner subsequently pled guilty in a New York State Court to charges of leaving the scene of an accident without reporting it, and reckless driving. The Petitioner pled guilty without an admission and there was no finding as to the underlying facts by the court. Petitioner felt that a guilty

plea was the only sound solution, despite his belief that he lacked the requisite mens rea to support a conviction. The Petitioner pleaded guilty in order to avoid publicity in order to protect the safety of his family; he feared a trial would expose his undercover activity. Petitioner also sought to limit adverse publicity for the agency as the result of a full trial .. Hrg. Tr. at pp. 179-80.

The Merit Systems Protection Board, New York Regional Office, by decision dated April 25, 1985, after a hearing collaterally estopped Mr. Hamill from bringing in proof of his innocence and approved the Petitioner's removal in reliance upon the guilty plea. It was further concluded that the Petitioner had attempted to "cover-up" his illegal activities. The Deciding Official based his decision to remove the Petitioner on

these alleged cover-up activities (Appendix "B", page B-11). Petitioner then filed a Petition for review to the full Merit Systems Protection Board, which was denied (Appendix "B", page B-1).

Petitioner thereafter appealed to the United States Court of Appeals for the Federal Circuit pursuant to USC §7703. By Order dated June 11, 1986, the Court of Appeals affirmed the decision of the Merit Systems Protection Board relying upon the prior opinion of the Merit Systems Protection Board and Order denying the Petition to review that opinion.

REASONS FOR GRANTING THE WRIT

This case concerns the application and propriety of the collateral estoppel doctrine by Administrative Tribunals governed by Federal law. More specifically, a

clarification is sought to unify the disparity among the circuits involving the preclusive effect of guilty pleas.

On October 13, 1978, Public Law 95-454 was enacted and appears generally 5 USC §§1101 et seq.. It was the legislative intent as provided for in §907 of such act that:

> ..."(2) the merit system principles which shall govern in the competitive service and in the executive branch of the Federal Government should be expressly stated to furnish guidance to Federal agencies in carrying out their responsibilities in administering the public business, and prohibited personnel practices should be statutorily defined to enable Federal employees to avoid conduct which undermines the merit system principles and the integrity of the merit system;
>
> "(3) Federal employees should receive appropriate protection through increasing the authority and powers of the Merit Systems Protection Board in processing hearings and appeals affecting Federal employees ...

the Board's position that because of the cover-up, it was for the good of the service that Petitioner be discharged. Specifically, John Bullard - Deciding Official of the Board, testified "that [petitioner] would have his job today if, as in the perception of the Board, he had not attempted to 'cover-up' the incident and had informed the agency." Appendix "B", page B-11.

Since the basis of removal was the alleged cover-up, an additional mens rea was attributed to Petitioner which was absent in the actual plea, which was limited solely to misconduct not knowingly committed.

The Board improperly relied upon Petitioner's guilty plea to support its conclusion that the misconduct was committed by collaterally estopping Petitioner from denying the alleged

It is the Petitioner's position that this agency has through its unbridled discretion caused a chilling effect by circumventing its legislative mandate.

The Court of Appeals for the Federal Circuit compounded the error by tacitly avoiding the issue and relied upon the decision and order of the Merit System Protection Board.

The initial decision of the Merit System Protection Board dated April 25, 1985, held that "[i]n light of [petitioner's] conviction for reckless driving and leaving the scene of an accident, he is collaterally (sic) estopped from denying such misconduct." Appendix "B", page B-8.

Based upon this conviction, the Board determined that the Petitioner attempted a 'cover-up' so that the incident would not be discovered. It was

misconduct. The Board cited Otherson v. Department of Justice, 711 F. 2d 267 (D.C. Cir. 1983) to support its estoppel position. However, Otherson can be distinguished from the case at bar. In Otherson, contrary to the present matter, there was a stipulation between the parties regarding the testimony of witnesses at the underlying criminal trial. In this matter, Petitioner pled guilty to two (2) misdemeanor charges without an admission and there was no finding of fact by the trial court.

At the Board hearing, the Petitioner "admitted that subsequently on August 22, 1984, he pled guilty in a New York State Court to reckless driving and leaving the scene of an accident. He testified further that he can neither confirm nor deny from personal recollection whether these events

happened, as [petitioner] claims he was in a state of "black out." Appendix "B", page B-8.

Under the doctrine of offensive collateral estoppel or issue preclusion, a defendant is precluded from relitigating identical issues that the defendant litigated and lost against another plaintiff. See, e.g., Southern Pacific Communications Co. v. AT&T, 740 F.2d 1011, 1014 n. 2 (1984). The doctrine is detailed, difficult, and potentially dangerous. In Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979), the Supreme Court refused to prohibit offensive collateral estoppel altogether, saying instead that "the preferable approach ... is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to

Cir.), cert. denied, - U.S.___ , 104 S.Ct. 239, 78 L.Ed.2d 229 (1983); Luben Industries, Inc. v. United States, 707 F.2d 1037, 1039 (9th Cir. 1983); Deweese v. Town of Palm Beach, 688 F.2d 731 (11th Cir. 1982); Oberweis Dairy v. Associated Milk Producers, 553 F.Supp. 962, 967 (N.D.Ill. 1982); GAF Corp. v. Eastman Kodak Co., 519 F.Supp. 1203, 1211-12 (S.D. N.Y. 1981).

Where offensive estoppel is involved, the element of "fairness" gains special importance. In Parklane Hosiery, the Supreme Court stated:

> The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where ... the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel. 439 U.S. 331, 99 S.Ct. 651

determine when it should be applied." 439 U.S. 331, 99 S.Ct. 651.

Briefly stated, three conditions must be satisfied before a party can use issue preclusion to estop a party from relitigating an identical issue previously decided.

(1) The issue must have been actually litigated, that is contested by the parties and submitted for determination by the court.

(2) The issue must have been "actually and necessarily determined by a court of competent jurisdiction" in the first trial.

(3) Preclusion in the second trial must not work an unfairness.

Otherson v. Department of Justice, INS, 711 F.2d 267, 273 (D.C. Cir. 1983); see also Nations v. Sun Oil Co. (Delaware), 695 F.2d 933, 938 (5th

"Fairness to the defendant" thus is a critical finding necessary for the application of offensive estoppel. "Trial courts should take into account a variety of considerations, all relevant to the ultimate question: Would application of offensive estoppel be unfair to the defendant?" Carr v. District of Columbia, 646 F.2d 599, 605 (D.C. Cir.1980). This notion of fairness reflects the equitable nature of issue preclusion.

Collateral estoppel is an equitable doctrine. Offensive collateral estoppel is even a cut above that in the scale of equitable values. It is a doctrine of equitable discretion to be applied only when the alignment of the parties and the legal and factual issues raised warrant it ... Its application is controlled by the principles of equity

... Fairness to both parties must be considered when it is applied.

Nations v. Sun Oil Co. (Delaware), 705 F.2d 742, 744-45 (5th Cir.1983) (on petition for rehearing and suggestion for rehearing en banc), cert. denied, ____ U.S. ____, 104, S.Ct. 239 78 L.Ed.2d 229 (1983); see also Luben Industries, Inc. v. United States, 707 F.2d 1037 (9th Cir. 1983); Collins v. Seaboard Coastline R.R. Co., 681 F.2d 1333 (11th Cir. 1982); Deweese v. Town of Palm Beach, supra; Crowder v. Lash, 687 F.2d 996 (7th Cir. 1982); Hicks v. Quaker Oats Co., 662 F.2d 1158, 1170 (5th Cir.1981). ("As a preliminary matter, we note that considerations of fairness are of great importance in determining when use of offensive collateral estoppel should be permitted."); Johnson v. United States, 576 F.2d 606, 614 (5th Cir. 1978)

(noting that collateral estoppel must not work an injustice against the party precluded); Annot., 58 L.Ed. 938, 944 (1979) ("The overriding consideration in abandoning a strict application of the doctrine of mutuality of parties, and applying collateral estoppel ... is fairness to that party ...").

In Parklane Hosiery, the Court identified four examples in which the application of offensive estoppel would be "unfair". Offensive estoppel should not be applied:

> (1) where the party asserting it easily could have joined in the action upon which reliance is placed;
>
> (2) where the party against whom it is to be applied had no incentive to defend vigorously the first action;
>
> (3) where the second action offers procedural opportunities unavailable in the first action;

been committed. See generally Burns v. United States, 287 U.S. 216, 222-23, 53 S.Ct. 154, 156, 77 L.Ed. 266 (1932); Coca-Cola Co. v. Tropicana Products, 690 F.2d 312 (2d Cir.1982); 2 Fed.Proc.L.Ed. § 3:654 (1981). As one appellate court observed in reviewing a district court's decision to apply offensive estoppel: "[The trial court's] discretion is not unlimited, however. Where there is a significant likelihood of substantial unfairness, application of offensive collateral estoppel constitutes an abuse of discretion." Deweese v. Town of Palm Beach, 688 F.2d 731, 734 (11th Cir. 1982). See also Collins v. Seaboard Coastline R.R. Co., 681 F.2d 1333 (11th Cir. 1982) (court must examine the premises upon which discretion is based).

In light of the Petitioner's guilty plea, it cannot be said that

> (4) where the judgment relied on is inconsistent with other decisions.

Parklane Hosiery, 439 U.S. 328-31, 99 S.Ct. 650-51. These examples do not constitute an exhaustive list. Id. 331, 99 S.Ct. 651.

As the Supreme Court indicated in Parklane Hosiery, the application of offensive estoppel is within the discretion of the trial judge. 439 U.S. 322, 99 S.Ct. 645. Thus, in reviewing the district court's decision to apply offensive estoppel, this court is bound by the abuse of discretion standard. See, e.g., Southern Pacific Communications v. AT&T, 740 F.2d 1011, 1017; Collins v. Seaboard Coastline R.R. Co., 681 F.2d 1333 (11th Cir.1982). That "abuse of discretion" is our standard of review, however, does not require us to turn a blind eye to errors that may have

Petitioner's criminal conviction was rendered as a result of actual litigation. 'Actually litigated' has been defined as "contested by the parties and submitted for determination by the court", Otherson, 711 F. 2d 273. To illustrate, the court, in Chisholm v. Defense Logistics Agency, 656 F. 2d 47 (3d Cir. 1981) remanded the case to the MSPB in order that they inquire into the prior criminal conviction to determine if the issue to which the court applied the estoppel "was in fact litigated and necessarily decided adversely ..." This followed a prior ruling from the Supreme Court which held that when a prior criminal judgment is sought to be used as an estoppel, the court must examine the record of the criminal proceeding, including the pleadings, evidence, jury instructions and other relevant matters

in order to determine specifically what issues were decided. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed. 2d 469 (1970).

In Otherson, the court specified that while it was not making a determination of whether a guilty plea satisfies the actual litigation requirement for collateral estoppel, it did note the following: In Haring v. Prosise, 462 U.S. 306, 76 L.Ed. 2d 595, 103 S.Ct. 2368 (1983), the Supreme Court held that Prosise, after pleading guilty to criminal charges, was not precluded from bringing a Sec. 1983 suit against police officers for alleged violations of his civil rights that occurred during the search that gave rise to his arrest. One of the three reasons the Court gave was that "the legality of the search ... was not actually litigated in the criminal

proceedings. Indeed, no issue was 'actually litigated' in the state proceeding since Prosise declined to contest his guilty in any way." Id. at _____ 103 S.Ct. 2374 (emphasis added). This view supports that of other judges and commentators, who insist that issues resolved by guilty plea are not always appropriate for issue preclusion. See, Meadows v. Evans, 550 F.2d 345, 345 (5th Cir.) (Goldberg, Jr. concurring and dissenting in part), cert. denied, 434 U.S. 969, 98 S.Ct. 517, 54 L.Ed 2d 457 (1977); Teitelbaum Furs Inc. v. Dominion Ins. Co., 58 Cal. 2d 601; 606-07, 375. p. 2d 439, 441 25 Cal. Rpts. 559, 561 (1962) (Traynor J.); 1B J. Moore & T. Currier, Moore's Federal Practice Para. 0.418[1], 2706-08 (2d Ed. 1982); 18 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure Sec. 4474, 759-61 (1981) The

opponents of preclusion for guilty pleas say a defendant who pleads guilty in no way contests the fact, so they are not actually litigated ..." Otherson, 711 F. 2d 275, N. 8.

In Haring v. Prosise; supra, the Supreme Court adopted this view as an opponent of preclusion for guilty pleas. Petitioner recognizes, as Otherson points out, that the question of issue preclusion and guilty pleas has not been entirely resolved, since the adoption of this view was not the actual holding. Petitioner instead takes notice of the Supreme Court's position that a guilty plea fails to satisfy the 'actual litigation' requirement of collateral estoppel.

Similarly, while a guilty plea may properly be introduced as an admission in a subsequent civil

proceeding, the doctrine of collateral estoppel may not be applied to conclusively establish liability. Instead, the guilty plea may be explained or rebutted in the subsequent civil case. See, McCormick, v. United States, 539 F. Supp. 1179, 1183 (D.C. Colo. 1982). "When a plea of guilty has been entered in the prior action, no issues have been 'drawn into controversy' by a 'full presentation' of the case. It may reflect only a compromise or a belief that paying a fine is more advantageous than litigation. Consideration of fairness to civil litigants and regard for the expeditious administration of criminal justice combine to prohibit the application of collateral estoppel against a party who having pleaded guilty to a criminal charge, seeks for the first time to litigate this cause in a Civil

Action". Id. at 1183. Id., citing Teitelbaum Furs Inc. v. Dominion Ins. Co., 58 Cal. 2d 601, 375 P. 2d 439, 441, 25 Cal Rpts. 559 (1962).

In Scott v. Robertson, 583 P. 2d 188 (Alaska 1978), the court found that a conviction based upon a plea to a traffic violation was not credible evidence of guilty conduct. It was reasoned that the costs of defending outweigh the burden of such a conviction on his record.

An additional requirement for the application of collateral estoppel is that the preclusion in the second trial must not work an unfairness. Otherson, 711 F. 2d 273. Preclusion may be deemed unfair if the party to be bound lacked an incentive to litigate in the first trial. Id. Here, not only did the Petitioner lack an incentive to litigate in the

first trial, the Petitioner had an overwhelming incentive NOT to litigate in the first trial. At the time of the incident at issue, the Petitioner was working undercover with the Hell's Angels -- a gang of ruthless drug dealers and killers. The Petitioner had a valid fear that if he went to trial, his safety and the safety of his family would be at risk. The Petitioner believed that avoiding the publicity of a trial would prevent his name and address from being published and therefore, his family would e in less danger. Additionally, the Petitioner believed that it would be better for the DEA's reputation to limit the publicity as much as possible. Based upon these considerations, the Petitioner, his attorney and the District Attorney's office made a conscious decision that a guilty plea was the best

course of conduct for all concerned. See, Hrg. Tr. at pp. 179-80. Thus, it is clear that the Petitioner had a strong incentive not to litigate in the first action and therefore, collaterally estopping him from denying the alleged misconduct in the subsequent MSPB action was in blatant contradiction to precedent case law, and therefore erroneous.

Another reason Petitioner should not be collaterally estopped from contesting his guilt before the MSPB is that, under the circumstances, his guilty plea was not a voluntary, knowing and intelligent act. A guilty plea must be a voluntary, knowing, intelligent act done with sufficient awareness of the relevant circumstances and likely consequences, Haring, 76 L. Ed. 2d 608, citing Brady v. United States, 397 U.S. 742, 747-748, 25 L. Ed. 2d 747, 90 S.Ct. 1463, citing

Boykin v. Alabama, 395 US 238, 242, 23 L.Ed. 2d 274, 89 S.Ct. 1709 (1969), the Petitioner was not aware when he consciously chose not to litigate for specific reasons, that his decision to plead guilty would be used against him to, in effect, warrant his removal.

The 11th Circuit in Greenblatt v. Drexel Burnham Lambert, Inc., 70 F.2d 1352, 1360 (1985), put forth yet another set of criteria for the application of collateral estoppel. There are several prerequisites to the application of collateral estoppel: (1) the issue at stake must be identical to the one alleged in the prior litigation; (2) the issue must have been actually litigated in the prior litigation; and (3) the determination of the issue in the prior litigation must have been a critical and necessary part of the judgment in that

earlier action. DeWeese v. Town of Palm Beach, 688 F.2d 731, 733 (11th Cir. 1982). In addition, the party against whom the earlier decision is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. Precision Air Parts, Inc. v. Avco Corp., 736 F.2d 1499, 1504 (11th Cir. 1984). The application of collateral estoppel is committed to the sound discretion of the district court. DeWeese, 688 F.2d 734.

Most guilty pleas consist of two elements: First, a waiver of trial, and second an admission of guilt. The second element need not be present in order to impose a criminal penalty. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed. 2d 162 (1970). In Alford, however, the Supreme Court was faced with a defendant who entered what

later became known as an "Alford plea". The defendant pleaded guilty yet contested his innocence simultaneously. In the Court's opinion, there is no material difference between a plea which does not admit commission of the crime (nolo contender) and one which protests innocence. (The Alford plea) Id. at 37.

The Petitioner, while pleading guilty in a New York State Court, neither confirmed nor denied whether the alleged misconduct occurred. Appendix B-7 . While the plea entered was a guilty plea in form, in substance, it is analogous to the nolo contendere plea.

The prior decisions of the Merit Systems Protection Board set precedent which should bind it in determining the propriety of collaterally estopping the Petitioner.

An employee's guilty plea does not collaterally estop him from denying a charge based on the same conduct in light of the fact that his plea was an Alford plea. Crofoot v. United States Government Printing Office, 21 MSPR, 248, 252 (1984). Similarly, a nolo contendere plea in a previous criminal proceeding is not binding in a future MSPB proceeding. Borninkhof v. Department of Justice, 5 MSPB 150, 152 N. 5 (1981). Pleas of nolo contendere are only afforded collateral estoppel effect where the agency bases its action only on the conviction and not on any underlying conduct implied from the plea. Crofoot, 21 MSPR 252, citing Bryant v. United States Postal Service, 12 MSPB 282, 283 (1982). This is a very important and pertinent distinction to the Petitioner's case. It is the agency's position, as previously

discussed, that the basis of its removal of Petitioner was because of his "cover-up activities. In order that the agency to have determined that the Petitioner had engaged in a conscious 'cover-up', they necessarily based their decision on the commission of the underlying conduct implied from the plea -- a prohibited Board action.

In Thompson v. Galaxy Enterprises, 414 F. Supp. 98 (SDNY 1976), the court relied upon the case law of New York, the situs of the criminal proceeding to disallow the collateral estoppel in the subsequent action. The case law in New York is well settled with regard to the preclusive effect of a prior criminal conviction. In S.T. Grand, Inc. v. City of New York, 32 N.Y.2d 300, 311 N.Y.S.2d 938, 298 NE2d 105 (1973). It was established that a

criminal conviction after trial is clear and convincing proof of the same facts necessarily implicated in subsequent litigation. It was emphasized, however, in criminal actions there are procedural safeguards including the requirement of proof beyond a reasonable doubt and of a unanimous verdict. The Court of Appeals the following year narrowed this rule in Vavolizza v. Krieger, 33 NY2d, 351, 352 NYS2d 919, 308 N.E.2d 439, (1974), by not extending the preclusive effect to guilty pleas. The standard has been followed that if the litigant had in the prior action a full and fair opportunity to contest the prior decision, that controls the issue of collateral estoppel. Schwartz v. Public Administrator of Bronx County, 24 N.Y.2d 65, 298 NYS 2d 955, 246 N.E.2d 725 (1969). The case at bar initiated in the criminal courts of New

York State and the fact that Petitioner entered a plea of guilty should extend the New York rule of preclusion to the subsequent quasi judicial forum.

The basis of due process is that a party have a full and fair opportunity to litigate. It has been consistently held as an exception to the general rule of issue preclusion in subsequent litigation that the following circumstances germain to the present and would justify relitigation:

> The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding ... [or] other compelling circumstances make it appropriate that the party be permitted to relitigate the issue Restatement of Judgements, 2d §29.

The Petitioner's guilty plea was a conscious decision, rendered after

consultation with his attorney and the District Attorney's office, in order to avoid publicity. The Petitioner sought to avoid publicity both to protect his family and to protect the DEA -- to shield the agency from as much negative press as possible.

The Board, however, failed to consider the validity of these reasons. Instead, it considered the plea as an admission to the commission of the underlying crime. Petitioner's reasons for pleading as opposed to going to trial were valid reasons. The Hell' Angels are dangerous, ruthless killers and drug dealers. Had the Petitioner gone to trial on the criminal charges, the press would very likely have publicized the trial -- including Petitioner's name and address as well as the fact that he was a DEA agent. Hrg. Tr. at p. 78. The

Petitioner feared for his safety and that safety of his family. In addition, after such publicity, the Petitioner would likely be useless as an undercover agent due to inevitable exposure of a trial. It is error that neither the Deciding Official nor the Presiding Official at the hearing accorded the reason for the Petitioner's guilty plea, its proper weight.

CONCLUSION

For the foregoing reasons, this Petition for a writ of certiorari should be granted.

Respectfully submitted,

AXELROD, CORNACHIO & FAMIGHETTI
Attorneys for Petitioner
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Of Counsel:

ROBERT M. SCHAUFELD

[APPENDIX FOLLOWS]

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

EDWARD P. HAMILL,	)
	)
Petitioner,	)
	)Appeal #86-695
v.	)
	) MSPB No.
DEPARTMENT OF JUSTICE,	) NY07528510218
	)
Respondent.	)

DECIDED: June 11, 1986

Before FRIEDMAN, DAVIS, and NEWMAN, Circuit Judges.

PER CURIAM.

The decision of the Merit Systems Protection Board (Board) upholding the removal of the petitioner as a criminal investigator of the Drug Enforcement Agency of the Department of Justice for (1) improperly operating a government vehicle, (2) endangering the safety of and causing injury to others through

reckless driving, and (3) leaving the scene of an accident in violation of state law, is affirmed on the basis of the opinion of the presiding official of the Board and the order of the Board denying the petition to review that decision.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

EDWARD P. HAMILL,	)
	)
Petitioner,	)
	)Appeal #86-695
v.	)
	) MSPB No.
DEPARTMENT OF JUSTICE,	) NY07528510218
	)
Respondent.	)

JUDGMENT

ON APPEAL from the Merit Systems Protection Board

in CASE NO(S). NY07528510218

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED: AFFIRMED

ENTERED BY ORDER OF THE COURT

Francis X. Gindhart, Clerk

DATED: June 11, 1986

ISSUED AS A MANDATE: July 2, 1986
COSTS: Against, Petitioner
PRINTING----------$231.36
TOTAL----------$231.36

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

EDWARD P. HAMILL, Appellant,	:	DOCKET NUMBER NY07528510218
- against -	:	DATE: Sept. 20, 1985
DEPARTMENT OF JUSTICE, agency.	:	

BEFORE

Herbert E. Ellingwood, Chairman
Maria L. Johnson, Vice Chair
Dennis M. Devaney, Member

ORDER

Having fully considered the appellant's petition for review of the remand decision issued on April 25, 1985, and finding that it does not meet the criteria for review set forth at 5 C.F.R. §1201.115, the Board hereby DENIES the petition.1/

1/ See Chisholm v. Defense Logistics Agency, 21 M.S.P.R. 99 (1984) (an employee's criminal conviction for certain specified acts collaterally estops him from denying that he committed those acts which led to his removal); Woody v. General Services Administration, 6 MSPB 410, 411 (1981) (disparate treatment is irrelevant where the record shows legitimate reasons for the difference in treatment); Karapinka v. Department of Energy, 6 MSPB 114, 115 (1981) (a procedural error by a presiding official is of no legal consequence unless it is shown to have adversely affected a party's substantive rights); Russo v. Veterans Administration, 3 MSPB 427, 429 (1981) (in order to satisfy the "new and material evidence" criterion in 5 C.F.R. § 1201. 115(a), the proffered submission must be of sufficient weight to warrant an outcome different from that ordered by the presiding official); Avansino v. U.S. Postal Service, 3 MSPB 308, 310 (1980) (the Board will not consider "new and material evidence" absent a showing that it was unavailable, despite the exercise of due diligence in obtaining it, before the record closed); and Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980) (mere disagreement with the presiding official's findings, credibility determinations, and conclusions is insufficient, without more, to warrant a full review of the appellate record by the Board).

This is the final order of the Merit Systems Protection Board in this appeal.

The initial decision shall become final

five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK REGIONAL OFFICE

EDWARD P. HAMILL, Appellant, v. DEPARTMENT OF JUSTICE, DRUG ENFORCEMENT ADMINISTRATION, Respondent.	Case No. NY07528510218 Date: April 25, 1985 William J. Lee Presiding Official

DECISION

By timely petition, Edward P. Hamill appealed his removal from the Drug Enforcement Administration (agency) effective January 11, 1985.

When removed, appellant held a position in the competitive service and was not serving a probationary or trial period therein. He is therefore entitled to appeal his removal to the Board

five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

The appellant is hereby notified of the right under 5 U.S.C. § 7703 to seek judicial review, if the court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be filed no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
NEW YORK REGIONAL OFFICE

EDWARD P. HAMILL,	)
	)Case No.
Appellant,	)NY07528510218
	)
v.	)Date: April 25,
	) 1985
DEPARTMENT OF JUSTICE,	)
DRUG ENFORCEMENT ADMIN-	)William J. Lee
ISTRATION,	) Presiding
	) Official
Respondent.	)

DECISION

By timely petition, Edward P. Hamill appealed his removal from the Drug Enforcement Administration (agency) effective January 11, 1985.

When removed, appellant held a position in the competitive service and was not serving a probationary or trial period therein. He is therefore entitled to appeal his removal to the Board

pursuant to 5 U.S.C. 7701(a); 7511(a)(1)(A); 7512(a) and 7513(d) (1982).

By letter dated October 10, 1984 (Case File at Tab 1), the agency proposed appellant's removal from his position as Criminal Investigator, GS 12-5, based on the following:

Charge No. 1: Improper Operation of an Official Government Vehicle

Charge No. 2: Leaving the Scene of an Accident in Violation of State Laws

Charge No. 3: Endangering the Safety of and Causing Injury to Others Through Reckless Driving

Charge No. 4: Unauthorized Use of an Official Govern-

ment Vehicle

Charge No. 5: Poor Judgment

Charge No. 6: Failure to Follow Written Instructions

Charge No. 7: Exceeding Authority

The proposed removal was upheld by John C. Bullard, Deputy Assistant Administrator, Operational Support Division (Case File at TAb 1). The MSPB hearing was duly held on March 15, 1985.

To sustain an action under 5 U.S.C. Chapter 75, subchapter II, the agency must support its decision by preponderant evidence. 5 C.F.R. 1201.56(c)(2) (1985).

Charges from No. 4 through No. 7 are lesser included offenses of the charges No. 1 through No. 3. For the purposes of the present case, therefore, the burden of proof must be met for the first three charges, namely, (1) improper

operation of an official government vehicle, (2) leaving the scene of an accident in violation of state law, and (3) endangering the safety of and causing injury to others through reckless driving. These charges arise out of an incident which occurred on the evening of August 6, 1984, when a government vehicle in the charge of appellant struck a bicyclist. The government vehicle thereupon left the scene of the accident without stopping. Both the agency and the appellant were informed of this incident by local police authorities three (3) days later. Appellant had made no report to anyone.

At the hearing, appellant admitted that subsequently on August 22, 1984, he pled guilty in a New York State Court to reckless driving and leaving the scene of an accident. (Appellant's

Exhibit VII). He testified further than he can neither confirm or deny from personal recollection whether these events happened, as appellant claims he was in a state of "black out." Both appellant and the agency stipulated that the statements of the eye-witnesses to the accident (Agency File at Tab 5, attachments 27-32) would conclusively establish the facts contained therein and no further proof of the stipulated facts is required. (Case File at Tab 10). The combined testimony asserts that the government vehicle which was in appellant's charge was being driven in a erratic fashion, struck a bicyclist and thereafter sped away.

In light of appellant's conviction for reckless driving and leaving the scene of an accident, he is collaterally estopped from denying such

misconduct. Otherson v. Department of Justice, 711 F.2d 267 D.C. Cir (1983). Considering that and the stipulated statements of eye-witnesses to the accident, appellant's failure to contest the charges, I find that the agency has met its burden of proof in establishing charges 1, 2, and 3 as set forth supra.

Nexus is required by 5 U.S.C. 7513(a) which specifies that an employee may be removed "only for such cause as will promote the efficiency of the service." A determination of this issue turns on "whether there was a connection between the employee's activities and the efficiency of the service." Young v. Hampton, 568 F.2d 1253, 1258 (7th Cir. 1977). It is well settled that abuse or misuse of government property goes to the heart of job efficiency and the achievement of agency goals. Woody v.

General Services Administration, 6 MSPB 410 (1981). See also Harrington v. Department of Transportation, 13 MSPB 14 (1983) and Ferguson v. Department of the Army, 8 MSPB 274 (1981). Also, driving while impaired or with a carelessness that endangers others is a per se misuse of a government vehicle. Stevenson v. Department of Justice, 12 MSPB 395 (1982). Finally, appellant as a law enforcement officer, has the general duty to uphold the law, not break it. McDonald v. Department of the Navy, 4 MSPB 459 (1980). A hit and run accident with a failure to timely report the event to supervisors is a violation of appellant's special obligation to uphold the law. Hildebrand v. Department of Justice, MSPB Docket No. AT07528210900 July 17, 1984. Thus, as the sustained charges are intrinsic to the efficiency

of the service, nexus has been established. Merritt v. Department of Justice, 6 MSPB 493 (1981).

The deciding official of the agency, Mr. John Bullard, testified that there was a history of DEA agents who like appellant, were involved in "hit and run" accidents which exposed the agency to liability under the Federal Tort Claims Act. Mr. Bullard further testified that appellant would have his job today if, as in the perception of the agency, he had not attempted to "cover-up" the incident and had informed the agency. Such conduct, Mr. Bullard stated, caused a loss of confidence in the appellant by his superiors.

Appellants posits an affirmative defense of innocent impairment, to wit, his unknowing ingestion of Tylenol No. 3 which includes

codeine as an active agent. When combined with a few alcoholic beverages, appellant claims that a period of "black out" was induced, rendering him incapable of remembering anything that transpired during the period of the accident. The chain of events set forth by appellant and other witnesses is as follows: after work on August 6, 1984 the appellant adjoined to a bar located in the same building as the agency office. The testimony varied as to whether appellant had four (4) drinks or seventeen (17). Appellant testified that he had ingested a number of Tylenol tablets with codeine before and after 4:30 P.M. These had been given to him by his wife in the morning after he had complained of having a headache. The pills had been prescribed by a physician for Mrs. Hamill. She neglected to inform him of

their special nature and he was under the misapprehension that they were regular Tylenol as they have an identical appearance. Appellant testified that the last thing he remembered was going to the bar restroom between 7:30 and 8:00 P.M. His next conscious thought was upon his arrival at home well over an hour and a half later. Appellant claims to have lacked sufficient conscious capacity to form the necessary mens rea to be guilty of the malevolant intent required to sustain the charges brought against him.

Any intent to deceive must be decided from all the circumstances. Farguson v. Army, 9 MSPB 773 (1982). In addition, all plausible explanations are to be considered in determining whether a cause of conduct is intentionally deceptive. Walker v. U.S. Postal Service, 9 MSPB 576 (1982). Both the

agency and the appellant introduced extensive pharmacological evidence. The declaration of William T. Beaver M.D. was introduced by the agency. (Agency Exhibit III.) Dr. Beaver is a member of the Department of Pharmacology of Georgetown University and is a consultant to the Washington Home/Georgetown University Hospital Unit on pain management problems. He stated (p. 2):

> Prescriptions of analgesics which combine codeine with another drug such as Aspirin or acetaminophen (Tylenol) have become most popular because they are well tolerated in therapeutic doses. The amount of codeine (90 mg.) contained in the Tylenol No. 3 caused by the plaintiff as a result of the three tablets taken at about 7:00 P.M. is only slightly in excess of the actual dose (60 mg.) and is within the usual dose range for codeine (30-12 mg.) ... . It is my opinion that any "blackout" alleged to have affected this plaintiff did not result from Tylenol No. 3. "Blackout" or amnesia is not an

> effect of a dose of codeine which is slightly in excess of the usual dose. Moreover, "blackout" is a well-known effect of an overdose of alcohol, while occasional drowsiness and light-headedness result from usual oral doses of narcotic drug such as codeine.
>
> ... Amnesia, significant impairment of consciousness, or effect on behavior are not seen after doses of codeine or codeine containing combination analgesics such as were taken by the plaintiff.

Forrest Resnikoff, M.D., an internist and consultant to the agency, by direct testimony essentially corroborated the opinions of Dr. Beaver. He also stated that an overdose of codeine would result in a state of total unconsciousness and incapacity to drive or any other "motor" activity, rather then "impaired ability", which is more indictive of alcohol overdose. Dr. Resnikoff's opinion is further confirmed by the Physician's Desk Reference (Agency

Exhibit 1) which sets forth the following symptoms for codeine overdose:

> Serious overdose with codeine is characterized by respiratory depression ... extreme somnolence progressing to stupor or coma, skeltal muscle flaccidity ...

Appellant presented the documentary opinions of two physicians (Appellant's Exhibits II and VI) which contradict the agency's expert opinions. On the same set of facts, namely ingestion of a number of tylenol with codeine tablets over a twelve (12) hour period, there would be "mental and physical impairment" and the "patient can exhibit a "blackout" which is not the same as a state of consciousness" (Charles R. Dunbar M.D. - Appellant's Exhibit II). In addition, "Mr. Hamill would not be aware of his actions, although he could still function and

operate a motor vehicle. Further, Mr. Hamill could not be expected to remember his actions after 7:00 p.m. on August 6, 1984. Memory loss would be expected based upon the amount of codeine and alcohol Mr. Hamill consumed on August 6, 1981." (Paul A. Lavinger, M.D. - Appellant's Exhibit VI). While appellant's medical testimony does not emanate from the same degree of expertise as the agency, I will accept it as competent. Accordingly, I find the medical opinions are, at best, mixed.

There remains, however, the remaining fact that appellant did not inform anyone in his chain of command about the damage to his vehicle. Appellant does not claim that his state of "blackout" lasted any longer than the evening of August 6, 1984. He admits that he regained his awareness at

approximately 10:00 P.M. on the night of the accident at his home. His wife informed him that evening that the windshield was cracked (Agency File - Tab 20). The next morning appellant took the government vehicle to the bodyshop where the agency normally had its car repaired. The owner of the body shop stated in the investigative report:

> On Tuesday, August 7, 1984, a DEA agent I know as Ed Hamill brought a 1980 Pontiac Grand Prix to my shop for a new windshield. The windshield on the car was broken and pushed in on the passengers side (Agency File - TAb 32; Emphasis Added).

Appellant thereupon paid for the repairs from his own funds. He testified he did this because there were no longer any agency funds for vehicle repair. Accepting this explanation as true, we are still left with the question as to why the appellant did not notify

his superiors as to the damage done to the government vehicle. The nature and extent of the damage put appellant on notice that the vehicle had either struck something or had been the object of a direct attack or severe vandalism. Yet, the first inkling that the agency had of any untoward incident involving its own vehicle or appellant was the inquiry by local police (Agency File - Tab B), on August 9, 1984, three days after the incident. Whatever the effect of the drug ingestion may or may not have been, even if such evidence is interpreted in its best light to favor appellant, he still had ample time to reflect upon the possibility, if not the actuality, of some dire event. He chose to remain silent and not inform anyone in the agency. Appellant argues that his utilization of a repair shop used as a

matter of course for agency vehicles demonstration his subjectively innocent frame of mind. This course of conduct is also consistent with same day service, as appellant needed the car for his daily duties and a standard operational procedure which would not draw attention.

Therefore in light of the above, appellant's affirmative defense must fail. First, I find that the prepondent weight of the pharmacological evidence to favor the agency and, arguendo, even if this were not the case, appellant had ample time and notice after he had recovered his consciousness to know that a serious incident occurred, and yet, he still failed to inform the agency. It was during this period, at the least, where his intent was deficient and thereby the agency prevails in establishing its charges.

The function of the Merit Systems Protection Board is to ensure that relevant factors do not go unconsidered in assessing discipline and that the penalty imposed is within the range of reasonableness. Douglas v. Veterans Administration, 5 MSPB 313 (1981). Even if the Board should determine that the agency-selected punishment is unreasonable, the Board is not then free to simply impose the discipline it thinks best. Rather, it must apply the maximum penalty that falls within the parameters of reasonableness. Davis v. Department of the Treasury, 8 MSPB 17 (1981).

In the present, case the appellant's offenses of endangering his own life and that of the public with a government car by driving in an impaired state and leaving the scene of what could

have been a fatal accident are egregious. Added to this are appellant's lack of candor and forthrightness in not coming forward even well after the fact to inform his superiors, and, the potential of monetary loss and inconvenience to the government. While holding such a sensitive position, it can not be challenged that a law enforcement agency has the right to expect and to hold its personnel to a high standard of conduct. MacDonald, supra. In a more recent case the Board has held that a law enforcement official with an agency, occupies a position of great trust and responsibility and therefore must conform to a higher standard of conduct than non-law enforcement employees. Quander v. Department of Justice, MSPB Docket No. SF07528311002 (August 16, 1984).

Weighed against the serious nature of appellant's misconduct, the record disclosed that he has been a federal law enforcement officer for twelve (12) years, employed by the agency for the last five (5) years with an outstanding performance record. This included two years of under-cover work with convicted murderers. An argument could be made that such a long term assignment could lead to a one-time stress reaction which might lead this Presiding Official, if he were the deciding official to a different conclusion. But my opinion in such a matter is of no moment as the Board does not exist to second guess bona-fide management decisions. A superb record and a positive outlook for future performance does not outweigh the agency's legitimate apprehension of his

reliability, judgment and lack of candor. His proven misconduct casts grave doubt on his ability to perform his duties or to restore the confidence of his superiors. Austin v. DEA, 10 MSPB 221 (1982); Barnhill v. Department of Justice, 9 MSPB 608 (1982); Hickman v. Department of Justice, 10 MSPB 132 (1982); and Hilderbrand, supra.

Appellant also claims that for like offenses, the agency did not exact identical punishment. As set forth in the "Standard Schedule of Disciplinary Offenses and Penalties" (Agency Exhibit No. 9), removal in this case was clearly within the authority of the agency. Furthermore an agency need not exercise its discretion identically in every case. As set forth in Vilela v. Department of the Air Force, 727 F.2d 1574, 1577 (1984):

> "A penalty that is within the authority of the agency is not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases" and "mere unevenness in the application of the sanction does not render its application in a particular case 'unwarranted in law'". Jones v. United States, 617 F.2d 233, 238 (Ct. Cl. 1980) (quoting Butz v. Floyer Livestock Commission Co., 411 U.S. 182, 187-88, (1973).

Therefore, under the particular circumstances of this case, the agency imposed penalty is not excessive, disproportionate or unreasonable. It is therefore SUSTAINED and the agency decision to remove appellant is AFFIRMED.

APPEAL RIGHTS

This is an initial decision of the Merit Systems Protection Board. Any party or the Office of Personnel Management may seek to have it reviewed

by the Board by filing one original and two copies of a petition for review with:

Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, N.W.
Washington, D.C. 20419

in accordance with 5 C.F.R. subsection 1201.114-.115 (1985). The petition for review must be filed on or before May 30, 1985 and must set forth objections to the initial decision, supported by references to applicable laws, regulations and the record.

This initial decision will become a final decision of the Board on May 30, 1985 unless a petition for review is filed by that date or the Board reopens the case on its own motion. 5 C.F.R. subsection 1201.113 and .117 (1985).

The appellant is hereby notified of the right under 5 U.S.C. 7703

to seek judicial review, if the Court has jurisdiction, of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N.W., Washington, D.C. 20439. The petition for judicial review must be received by the Court no later than thirty (30) days after the appellant's receipt of this decision.

Such a petition may not be filed as long as the case is pending before the Board. To be timely, the petition must be received by the Court within 30 days of the final Board decision. 5 U.S.C. section 7703(b)(1).

ENFORCEMENT

Any party seeking enforcement of a final decision must file a petition for enforcement with this office in

accordance with 5 C.F.R. section 1201.181 (1985).

ATTORNEY FEES

When the appellant has prevailed, (s)he may request payment of attorney fees. Any such request must be filed with this office within 10 days of the date this decision becomes final. 5 C.F.R. section 1201.37 (1985).

FOR THE BOARD

Dated: April 25, 1985

William J. Lee
Presiding Official